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No. 10-975

Supreme Court, U.S.
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In The
# Supreme Court of the United States

SUZANNE DUONG BONDS,

*Petitioner,*

vs.

143 NENUE HOLDINGS, LLC and
AMERIQUEST MORTGAGE COMPANY,

*Respondents.*

**On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of Hawai`i**

## RESPONDENT AMERIQUEST MORTGAGE COMPANY'S BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because Petitioner Suzanne Bonds's ("Petitioner") constitutional claim is barred by Hawai`i statutory and common law.

2. Whether Petitioner's challenge to the non-judicial foreclosure sale is barred by the doctrine of res judicata.

3. Whether a privately conducted non-judicial foreclosure sale constitutes "state action" that implicates Petitioner's federal constitutional rights.

## LIST OF PARTIES

Additional counterclaim defendants-appellees below, who are not parties here, were Ronald Au, Ryan Au, and Natalie Au.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Ameriquest Mortgage Company ("Ameriquest"), pursuant to Rule 29.6 of the Rules of the Supreme Court, hereby submits its Corporate Disclosure Statement as follows:

Ameriquest is a privately held company. Its parent company is ACC Capital Holdings Corporation, a privately held company. No publicly held corporation owns 10% or more of Ameriquest's stock.

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## OPINIONS BELOW

The opinion of the Hawai`i Intermediate Court of Appeals in this action is set forth at *143 Nenue Holdings, LLC v. Bonds*, No. 28505, 2010 WL 2126481, at *1 (Haw. Ct. App. May 27, 2010).

The Hawai`i Supreme Court Order Rejecting Application for Writ of Certiorari is set forth in Petitioner's Appendix at pp. A-9 through A-10.

## JURISDICTION

This Court lacks jurisdiction to decide this case because no actual case or controversy exists. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). In this case, Petitioner's claim is barred by Haw. Rev. Stat. § 501-118.

## STATUTES OR OTHER PROVISION INVOLVED

Haw. Rev. Stat. § 501-118 (2006 Repl.),[1] which provided:

> **Foreclosure**
>
> Mortgages of registered land may be foreclosed like mortgages of unregistered land.
>
> In case of foreclosure by action, a certified copy of the final judgment of the court confirming the sale may be filed or recorded with the assistant registrar or the deputy after the time for appealing therefrom has expired and the purchaser shall thereupon be entitled to the entry of a new certificate.
>
> In case of foreclosure by exercising the power of sale without a previous judgment, the affidavit required by chapter 667 shall be recorded with the assistant registrar. The purchaser or the purchaser's assigns at the foreclosure sale may thereupon at any time present the deed under the power of sale to the assistant registrar for recording and obtain a new certificate. Nothing in this chapter shall be construed to prevent the mortgagor or other person in interest from directly impeaching by action or otherwise, any foreclosure proceedings affecting registered land, prior to the entry of a new certificate of title.

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[1] This was the statute in effect at the time the relevant facts at issue in this case occurred.

After a new certificate of title has been entered, no judgment recovered on the mortgage note for any balance due thereon shall operate to open the foreclosure or affect the title to registered land.

Haw. Rev. Stat. § 667-5 (1993), which provided:

**Foreclosure under power of sale; notice; affidavit after sale**

When a power of sale is contained in a mortgage, the mortgagee, or the mortgagee's successor in interest, or any person authorized by the power to act in the premises, may, upon a breach of the condition, give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and also give such notices and do all such acts as are authorized or required by the power contained in the mortgage. Copies of the notice shall be filed with the state director of taxation and shall be posted on the premises not less than twenty-one days before the day of sale.

Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the

> mortgagee's behalf. The mortgagee shall, within thirty days after selling the property in pursuance of the power, file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.
>
> The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.
>
> This section is inapplicable if the mortgagee is foreclosing as to personal property only.

## I. INTRODUCTION

Petitioner was in default under her note and mortgage for six months before the non-judicial foreclosure sale of her property on April 2, 2004 (the "Sale"). After failing to properly contest the Sale, she has attempted, over the last six years, to set it aside through a series of collateral proceedings. Undaunted by four unsuccessful Hawai`i circuit court proceedings, three unsuccessful appeals to the Hawai`i Intermediate Court of Appeals ("ICA") and two unsuccessful Hawai`i Supreme Court writs, Petitioner now turns to this Court for relief. In essence she belatedly raises one claim: Hawai`i's non-judicial mortgage foreclosure statute, Haw. Rev. Stat. § 667-5, is unconstitutional. Among other reasons, the Petition for Writ of Certiorari ("Writ") should be denied

because (1) an affidavit of foreclosure was recorded and title transferred to the purchaser upon the Sale, thereby rendering Petitioner's claim moot; (2) Petitioner failed to timely raise her constitutional claim contesting the Sale; and (3) there was no state action to implicate Petitioner's federal constitutional rights.

## II. STATEMENT OF THE CASE

### The Mortgage

Petitioner's former property is located at 143 Nenue Street, Honolulu, Hawai`i, more particularly described as T.M.K. (1) 3-6-005-053 (the "Property"). The Property is registered in the Hawai`i Land Court System.[2] On or about July 9, 2001, Petitioner, as borrower, refinanced the Property with Ameriquest,

[2] There are two systems for recording title to land in Hawai`i. In the "Land Court System," governed by Haw. Rev. Stat. Chapter 501, real property is registered with the Land Court. "The system of land title registration . . . codified in [Haw. Rev. Stat.] chapter 501 is a system for registration of land under which, upon the landowner's application, the court may, after appropriate proceedings, direct the issuance of a certificate of title." *Aames Funding Corp. v. Mores*, 107 Hawai`i 95, 101, 110 P.3d 1042, 1048 (2005) (internal quotation marks and citation omitted). "The purpose of this registration system is to conclusively establish title to land through the issuance of a certificate of title [('TCT')]." *Id.* In the "Regular System," governed by Haw. Rev. Stat. Chapter 502, conveyances of real property are recorded in the Bureau of Conveyances for the purpose of giving "notice to the general public of the conveyance and to preserve the recorded instrument as evidence." *Markham v. Markham*, 80 Hawai`i 274, 281, 909 P.2d 602, 609 (Haw. Ct. App. 1996).

as lender, obtaining a loan in the amount of $500,000 (the "Loan"). The Loan was evidenced by an Adjustable Rate Note executed by Petitioner and dated July 9, 2001 (the "Note"). Record on Appeal ("Record") Vol. II: 156. The Note was secured by a Mortgage on the Property dated July 9, 2001 (the "Mortgage") recorded as Document No. 2721733 and noted on TCT No. 586,754. *Id.* at 137. The Mortgage provided in relevant part that "Borrower does hereby mortgage, grant and convey to Lender, with power of sale," the Property to secure the Loan. *Id.* at 139.

**The Non-Judicial Foreclosure Sale**

Petitioner defaulted on her loan. Despite notice, Petitioner did not cure the default, and Ameriquest – without the involvement of Fannie Mae or Freddie Mac – exercised the power of sale contained in the Mortgage. *See* Record Vol. II: 164-84. On April 2, 2004, pursuant to Haw. Rev. Stat. § 667-5, the Property was sold to 143 Nenue Holdings, LLC ("Nenue Holdings"), the highest bidder, at a non-judicial foreclosure sale conducted by Town & Country Title Services, Inc. ("Town & Country"). The Sale netted excess proceeds of $104,757.61, which were held by Town & Country. *Id.* at 284. On April 23, 2004, an Affidavit of Foreclosure was recorded in the Land Court. *Id.* On May 19, 2004, a Quitclaim Deed quitclaiming the Property to Nenue Holdings was recorded in the Land Court. *Id.* at 185. On May 19, 2004, a new TCT was issued in favor of Nenue Holdings (TCT No. 697,675). *Id.* at 421.

**Petitioner's Special Proceeding**

On June 17, 2004, nearly two months after the Affidavit of Foreclosure was recorded, Petitioner instituted a special proceeding to challenge the Sale ("Special Proceeding") by filing a "Motion to Cancel Foreclosure Under Power of Sale" ("Motion to Cancel") in the First Circuit Court of the State of Hawai`i ("Circuit Court").[3] Record Vol. II: 190. Petitioner's Motion to Cancel was based on the theory that Part II – rather than Part I – of Hawai`i's mortgage foreclosure statute[4] applied to the Sale, and that Ameriquest had failed to follow the procedure set forth in Part II. *Id.* at 194. Petitioner did not challenge the constitutionality of the non-judicial foreclosure

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[3] At that time, Petitioner was represented by attorney Ronald Au. Record Vol. II: 27.

[4] In 2004, Hawai`i's mortgage foreclosure statute contained three parts, two of which are relevant for purposes of this discussion. Part I of Haw. Rev. Stat. Chapter 667 governs non-judicial foreclosures, such as the one that took place in this case. Part II, entitled "Alternative Power of Sale Process," provides – as its title suggests – an alternative process to that set forth in Part I for conducting non-judicial foreclosures. So long as the contract between the parties allows it (as was the case here), lenders can select either process to conduct a non-judicial foreclosure sale. *See Navarro v. Midfirst Bank*, No. 26745, 2007 WL 4358975, at *1 (Haw. Ct. App. Dec. 13, 2007) (holding that the lender validly exercised its right to conduct a non-judicial foreclosure sale pursuant to Part I of Haw. Rev. Stat. Chapter 667 rather than Part II because "[a]ccording to the valid terms of the agreement executed between the parties, the lender was given the right to elect the power of sale to be applied during the foreclosure proceedings").

statute in the Special Proceeding. On August 18, 2004, the Circuit Court issued an order denying Petitioner's Motion to Cancel, *id.* at 260, and on November 22, 2004, the Circuit Court entered final judgment in favor of Ameriquest in the Special Proceeding ("Special Proceeding Final Judgment"), *id.* at 266. Petitioner did not file a notice of appeal after the entry of the Special Proceeding Final Judgment, and the time to appeal has lapsed.[5]

**Town & Country's Interpleader Action**

On September 10, 2004, Town & Country filed a Complaint in Interpleader for the excess proceeds it held as a result of the Sale ("Interpleader Action"). Record Vol. II: 360. Both Town & Country and Ameriquest filed motions for summary judgment seeking, respectively, to interplead the excess proceeds and for attorney's fees and costs. *Id.* at 269, 332. Petitioner opposed both motions, arguing, among other things, that the Circuit Court had no jurisdiction to decide the Special Proceeding.[6] *Id.* at 347. As in the Special Proceeding, Petitioner did not challenge the constitutionality of Haw. Rev. Stat. § 667-5.

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[5] In Hawai`i, "[w]hen a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order." Hawai`i Rules of Appellate Procedure Rule 4(a)(1).

[6] On or before July 2, 2004, Petitioner discharged Ronald Au, who was replaced by Petitioner's current counsel. *See* Record Vol. V: 67.

On April 19, 2005, the Circuit Court entered final judgment in favor of Town & Country. *Id.* at 381. On April 28, 2005 the Circuit Court entered final judgment in favor of Ameriquest.[7] *Id.* at 384. Petitioner did not file a notice of appeal after the entry of the Interpleader Action Final Judgments and the time to appeal has lapsed.

**Nenue Holdings's Ejectment Action**

Despite the entry of final judgment in both the Special Proceeding and the Interpleader Action, Petitioner refused to vacate the Property. Therefore, on March 7, 2005, Nenue Holdings filed a complaint seeking Petitioner's ejectment ("Ejectment Action"). Record Vol. I: 1. On August 25, 2005, Petitioner answered and filed a counterclaim against several defendants,[8] including Nenue Holdings and Ameriquest ("Counterclaim") alleging, among other things, that Petitioner (1) did not receive proper notice of the Sale, (2) signed the Note and Mortgage without

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[7] These final judgments will be collectively referred to as the "Interpleader Action Final Judgments."

[8] In her Counterclaim, Petitioner also alleged that her former counsel, Ronald Au, committed malpractice by initiating the Special Proceeding. Of course, Petitioner cannot rely on alleged mistakes committed by her former counsel as a reason for relief because in "our system of representative litigation, . . . each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962).

understanding their contents, and (3) did not receive documents required by the Truth In Lending Act. *Id.* at 26. Additionally, Petitioner asserted, for the first time, that Haw. Rev. Stat. § 667-5 was unconstitutional. *Id.* at 47, 51.

Nenue Holdings and Ameriquest filed motions to dismiss. Ultimately, on November 10, 2005, the Circuit Court entered final judgment in favor of Nenue Holdings and Ameriquest on all of Petitioner's claims except for those attacking the constitutionality of Haw. Rev. Stat. § 667-5, which it reserved for further briefing ("November 2005 Final Judgment").[9] Record Vol. V: 1. After supplemental briefing, on March 30 and 31, 2006, the Circuit Court granted summary judgment in favor of Nenue Holdings and Ameriquest. Record Vol. VIII: 64, 67. On April 18,

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[9] On December 5, 2005, Petitioner appealed the November 2005 Final Judgment ("First Appeal"), Record Vol. V: 116. Also on December 5, 2005, Petitioner filed a Notice of Pendency of Action ("NOPA") based on the filing of the First Appeal. *Id.* at 161. On February 21, 2006, the Circuit Court expunged the NOPA ("NOPA Expungement"), Record Vol. VII: 1, which Petitioner appealed ("Second Appeal"), Record Vol. VIII: 37. On January 18, 2007, the Hawai`i ICA dismissed Petitioner's appeal of the NOPA Expungement as moot, *143 Nenue Holdings, Inc. v. Bonds*, Nos. 27659, 27833, 2007 WL 141185, at *1 (Haw. Ct. App. Jan. 18, 2007), and on January 19, 2007, the ICA affirmed the November 2005 Final Judgment, *143 Nenue Holdings, LLC v. Bonds*, Nos. 27659, 27833, 2007 WL 141315, at *1 (Haw. Ct. App. Jan. 19, 2006). On June 7, 2007, the Hawai`i Supreme Court rejected Petitioner's application for writ of certiorari to review the ICA's affirmance of the November 2005 Final Judgment.

2006, the Circuit Court entered final judgment in favor of Nenue Holdings and Ameriquest on Petitioner's constitutional claim. *Id.* at 77. On March 23, 2007, the Circuit Court amended the April 18, 2006 final judgment ("March 2007 Final Judgment"). Petitioner appealed ("Third Appeal").

On May 27, 2010, the Hawai`i ICA, in an unpublished decision, affirmed the March 2007 Final Judgment. *143 Nenue Holdings, LLC v. Bonds*, No. 28505, 2010 WL 2126481, at *2 (Haw. Ct. App. May 27, 2010). The ICA held that Petitioner's constitutional claim was barred by Haw. Rev. Stat. § 501-118:

> [i]n light of *Aames Funding* and Haw. Rev. Stat. § 501-118, Ameriquest and Nenue [Holdings] were entitled to judgment as a matter of law as [Petitioner] failed to successfully impeach the foreclosure action before a [TCT] had been issued in Nenue [Holdings's] favor.

*Id.*, at *2. The ICA did not address the issue whether Haw. Rev. Stat. § 667-5 was constitutional "[b]ecause [the ICA] does not have jurisdiction to decide abstract propositions of law or moot cases[.]" *Id.*

Petitioner applied for certiorari to the Hawai`i Supreme Court, which rejected her application on September 13, 2010. This Writ followed.

## III. REASONS FOR DENYING THE WRIT

### A. This Court Lacks Jurisdiction To Decide Petitioner's Claim

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 71 (1983) (citation omitted). In this case, Petitioner's injury cannot be redressed by this Court because the Sale was completed almost seven years ago and Haw. Rev. Stat. § 501-118 bars any challenge after the entry of the TCT.

Haw. Rev. Stat. § 501-118 governs the foreclosure of registered land and provides in relevant part that "[n]othing in this chapter shall be construed to prevent the mortgagor or other person in interest from directly impeaching by action or otherwise, any foreclosure proceedings affecting registered land, **prior to the entry of a new certificate of title**." (Emphasis added.) Under this provision, the entry of a new TCT is an absolute bar to any subsequent action to impeach the foreclosure proceeding. *Aames*, 107 Hawai`i at 103, 110 P.3d at 1050.

In *Aames*, a non-judicial foreclosure sale was conducted, and a TCT was issued to the purchaser. *Id.* at 96-97, 110 P.3d at 1043-44. Because the borrowers refused to surrender possession, the purchaser

filed an action for ejectment, whereupon the borrowers attempted to rescind the mortgage. *Id.* at 97, 110 P.3d at 1044. The court "surmised from the text of [Haw. Rev. Stat.] § 501-118 that a mortgagor's right to 'impeach[] . . . any foreclosure proceeding' is expressly limited to the period before entry of a new certificate of title." *Id.* at 101, 110 P.3d at 1048. The court held that because the borrowers did not object to the non-judicial foreclosure sale until after the TCT was issued, "title to the subject property in [the purchaser] became 'conclusive and unimpeachable.'" *Id.* at 103, 110 P.3d at 1050.

The facts of this case are strikingly similar to *Aames*. A non-judicial foreclosure sale was conducted; a TCT in favor of Nenue Holdings was issued; Petitioner refused to surrender possession, forcing Nenue Holdings to file the Ejectment Action; and Petitioner challenged the Sale during the Ejectment Action, rather than prior to the issuance of the TCT. It is a short jump from the result in *Aames* to the ICA's proper conclusion in this case: Nenue Holdings's title to the Property is unimpeachable, and Haw. Rev. Stat. § 501-118 bars Petitioner from the relief she seeks.

### B. Petitioner's Claim Is Barred By Res Judicata

Petitioner's failure to challenge the constitutionality of Haw. Rev. Stat. § 667-5 in the Special Proceeding is fatal to her Writ. "A final judgment on

the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *See also Ellis v. Crockett*, 51 Haw. 45, 55, 451 P.2d 814, 821-22 (Haw. 1969) (stating that res judicata "precludes the relitigation . . . of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided") (internal quotation marks and citation omitted). "In order for res judicata to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." *Western Radio Services Co., Inc. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997), *cert. denied*, 519 U.S. 822 (1996) (citing *Blonder-Tongue Lab. v. University of Ill. Found.*, 402 U.S. 313, 323-24 (1971)). All of these elements are present in this case.

First, "[t]he central criterion in determining whether there is an identity of claims between the first and second adjudications is whether the two suits arise out of the same transactional nucleus of facts." *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713-14 (9th Cir. 2001). *See also Tait v. Western Maryland Ry. Co.*, 289 U.S. 620, 625 (1933) (res judicata applied where "[t]he very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding"). Here, both the Special Proceeding and Petitioner's constitutional challenge are based on the same set of operative facts: the Sale of the Property. Petitioner's

constitutional challenge, raised for the first time in the Ejectment Action, is a "ground[ ] for recovery which could have been asserted, whether [it was] or not, in a prior suit between the same parties . . . on the same cause of action." Accordingly, an identity of claims exists between the Special Proceeding and the Ejectment Action.

Second, there is a final judgment on the merits. The Circuit Court denied Petitioner's Motion to Cancel, and entered final judgment in favor of Ameriquest. Petitioner did not appeal the Special Proceeding Final Judgment.

Third, there is identity between the parties; both Ameriquest and Petitioner were parties to the Special Proceeding. Thus, all elements of the res judicata test are satisfied.

Additionally, public policy underlying the res judicata doctrine supports barring Petitioner's belated challenge to Hawai`i's non-judicial foreclosure statute. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931).

Here, Petitioner seeks to unreasonably perpetuate the litigation. She has unsuccessfully challenged the Sale in three separate court proceedings (the Special Proceeding, the NOPA Action, and the Ejectment Action) as well as unsuccessfully asserted

claims in another (the Interpleader Action). Petitioner has unsuccessfully appealed three separate times to the Hawai`i ICA and her two writs to the Hawai`i Supreme Court have been rejected. These proceedings and appeals have prolonged a process which should have been completed nearly seven years ago. In sum, Petitioner continues to challenge the Sale even though she failed to appeal the Special Proceeding Final Judgment. This Court has "stressed that '[the] doctrine of res judicata . . . is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts. . . . '" *Moitie*, 452 U.S. at 401 (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Accordingly, res judicata precludes Petitioner from litigating the constitutionality of Haw. Rev. Stat. § 667-5 in the Ejectment Action.[10]

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[10] The allegations in the Petition regarding Petitioner's health and the alleged unfairness of the Sale are irrelevant to the question whether Petitioner's claim is barred by res judicata. "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" *Moitie*, 452 U.S. at 401 (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)).

### C. Even If Petitioner's Claim Were Not Barred, There Is No State Action Upon Which To Base Her Asserted Violations Of The Federal Constitution

Petitioner alleges that the Sale violated her Fourteenth Amendment right to due process. Writ, 1.[11] "Because the language of the Fourteenth Amendment is directed at the states, a violation occurs only by conduct that may be fairly characterized as 'state action.'" *Long v. National Football League*, 870 F.Supp. 101, 103 (W.D. Pa. 1994); *Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (Equal Protection Clause "erects no shield" against private conduct) (citation omitted); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 935 n.18 (1982) (discussing "state-action requirement of the Fourteenth Amendment"). Thus, Petitioner must demonstrate some type of state action in order to assert a claim under the Fourteenth Amendment. *Id.* Petitioner fails to do so.

Petitioner claims the Sale involved state action because "the use of Section 667-5 [] is carefully orchestrated by federal housing agencies[,]" specifically Fannie Mae and Freddie Mac, who "mandate"

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[11] Petitioner also alleges that the Sale violates the Supremacy Clause. Writ, 1. Such a claim also requires the existence of state action. *Ross v. Hatfield*, 640 F.Supp. 708, 712 (D. Kan. 1986) (holding that court lacked subject matter jurisdiction to decide plaintiffs' Supremacy Clause claim because it found "the necessary state action lacking"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001) (discussing circumstances under which Supremacy Clause forecloses state action).

the use of the non-judicial foreclosure process.[12] Writ, 20. However, Petitioner does not even allege that Fannie Mae, Freddie Mac, or any other "federal housing agency" mandated the use of the non-judicial foreclosure process in this case, much less offer any evidence that they did. In fact, neither Fannie Mae nor Freddie Mac was involved with the Sale; the Loan was made by Ameriquest and Ameriquest – not Fannie Mae or Freddie Mac – exercised the power of sale. For this reason alone, Petitioner has failed to establish that the Sale involved state action.

Even if Fannie Mae or Freddie Mac (or any other "federal housing agency," for that matter) were involved with the Sale, those organizations are not state actors. *American Bankers Mortg. Corp. v. Federal Home Loan Mortg. Corp.*, 75 F.3d 1401, 1408 (9th Cir. 1996) ("Freddie Mac is not a government agency subject to the Fifth Amendment's Due Process Clause."), *cert. denied*, 519 U.S. 812 (1996); *Humpherys v. Nager*, 962 F.Supp. 347, 351 (E.D. N.Y. 1997) ("Private parties like Freddie Mac are generally not liable to suit under § 1983 as they are not state actors."); *Liberty Mortg. Banking, Ltd. v. Federal Home Loan Mortg. Corp.*, 822 F.Supp. 956, 957

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[12] This is a new argument for Petitioner; she did not make such a claim in her briefs below. Additionally, Petitioner argues that "Hawaii's Section 667-5 is a vicious throwback to the historic theft of land from the ethnic Hawaiians." Writ, 18. Even if this were true, it is irrelevant to the question whether Haw. Rev. Stat. § 667-5 involves state action.

(E.D.N.Y. 1993) (holding that "Freddie Mac is neither a federal actor nor a state actor" and noting that "the federal courts have uniformly held that Fannie Mae and the Government National Mortgage . . . are not engaged in state action when they undertake various activities").

In all of these cases, the courts examined whether **Freddie Mac** itself was a state actor. *American Bankers*, 75 F.3d at 1411; *Humpherys*, 962 F.Supp. at 351-52; *Liberty Mortgage*, 822 F.Supp. at 960-61. Here, Petitioner does not even attempt to convince this court that Fannie Mae or Freddie Mac are state actors. Instead, she *assumes* they are and that the alleged instructions on their "official Website archives" regarding the use of non-judicial foreclosure proceedings somehow turn the actions of **Ameriquest** into state action. *See* Writ, 20-22. Petitioner assumes too much. As noted above, Fannie Mae and Freddie Mac are not state actors. Thus, their purported instructions as to the use of the non-judicial foreclosure process are irrelevant to the determination whether state action exists in this case.[13]

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[13] Even if Fannie Mae or Freddie Mac had been involved with the Sale (which Petitioner does not allege) their involvement would not in and of itself convert the Sale into state action. *Warren v. Government Nat. Mortg. Ass'n*, 611 F.2d 1229, 1234 (8th Cir. 1980) ("[A] wholly-owned government agency can enforce a valid Contractual provision for foreclosure without running afoul of the constraints of the Fifth Amendment, under all circumstances in which the foreclosure of the same contract

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Further, courts have repeatedly held that non-judicial foreclosure proceedings, such as the Sale conducted in this case, cannot be considered state action. *Apao v. Bank of New York*, 324 F.3d 1091 (9th Cir. 2003), *cert. denied sub nom. Apao v. ARM Financial Corp.*, 540 U.S. 948 (2003); *Warren*, 611 F.2d at 1235 (8th Cir. 1980) (stating that "mortgage foreclosures through power of sale agreements such as the one at issue here are not in and of themselves powers of a governmental nature"); *Barrera v. Security Bldg. & Inv. Corp.*, 519 F.2d 1166, 1170, 1174 (5th Cir. 1975) (determining that there was "no significant state action . . . involved in non-judicial foreclosures" because there was an "absence of direct state involvement in the act by which the deprivation itself was accomplished").

In fact, in *Apao*, the Ninth Circuit examined a claim identical to the one in this case. Relying on several cases from this Court and sister circuits, the Ninth Circuit concluded that non-judicial foreclosures conducted pursuant to Haw. Rev. Stat. § 667-5 were not state action because "[t]he statute neither encourages nor compels the procedure, but merely recognizes its legal effect." *Apao*, 324 F.3d at 1094. Apao concluded that Haw. Rev. Stat. § 667-5 "merely authorized the parties to contract for the express terms of foreclosure upon default." *Id.* at 1095. The

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by a private lender would be held not to violate the requirements of due process.") (citation omitted).

court held that "[w]hile the bar for state action is low . . . non-judicial foreclosure procedures like Hawaii's nevertheless slip under it for want of direct state involvement." *Id.* (citation omitted).[14]

Petitioner also alleges that state action exists due to "the conclusively presumptive interpretation given to Land Court non-judicial foreclosures by the Hawaii Supreme Court in *Aames*." Writ, 12. Assuming Petitioner is arguing that the Hawai`i courts' denial – pursuant to Haw. Rev. Stat. § 501-118 – of the relief she sought from the Sale amounts to state action, this Court has rejected such a theory. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) ("If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner."). Nor do Haw. Rev. Stats. § 501-118 or § 667-5 constitute state action. *See Barrera*, 519 F.2d at 1170. In *Barrera*, the Eighth Circuit determined that "[t]he appellants' argument that [Tex. Code. Ann.] Article 3810[15] is by itself constitutionally significant state involvement does not withstand examination." *Barrera*, 519 F.2d at

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[14] As in *Apao*, a required element of state action – "'overt official involvement' in the enforcement of creditors' remedies" – is entirely lacking in this case. *See Apao*, 324 F.3d at 1095.

[15] At that time, Article 3810 governed the manner in which non-judicial foreclosure sales were conducted.

1170. The court noted that Article 3810 does not authorize the power of sale. Nor does it even codify the right to contract for and to exercise that power. Certainly it does not compel it." *Id.* at 1170-71. The court determined that there was no state action because the purpose of Article 3810 was to regulate, rather than "aid, support, or encourage foreclosures under powers of sale." *Id.* at 1171.

The same is true of Haw. Rev. Stat. § 501-118, as well as Haw. Rev. Stat. § 667-5. Neither statute authorizes the power of sale, nor do they codify the right to contract for it. Instead, like the non-judicial foreclosure statute in *Barrera*, they regulate the manner in which non-judicial foreclosure sales are conducted. "Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept." *Apao*, 324 F.3d at 1095 (quoting *Adams v. Southern California First Nat. Bank*, 492 F.2d 324, 330-31 (9th Cir. 1973)).

Finally, Petitioner argues that this Court has not "directly address[ed]" the constitutionality of "non-judicial foreclosures in the context of state action." Writ, 11. Even if that were true, this Court has upheld the validity of non-judicial foreclosure sales in other contexts. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541-42 (1994) (rejecting challenge to non-judicial foreclosure and holding "that a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the

foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with")[16]; *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 170 (1982) (upholding non-judicial foreclosure proceedings instituted pursuant to Federal Home Loan Bank Board regulation that pre-empted state law).

Thus, Petitioner has failed to articulate a compelling reason to grant her Writ. *See* Supreme Court Rule 10(c) (providing that this Court considers whether "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

## IV. CONCLUSION

The time for Petitioner to challenge the lawfully conducted, non-judicial foreclosure sale on her property has long passed. Despite failing to (1) raise her constitutional claim in her Special Proceeding or (2) appeal the Special Proceeding Final Judgment, Petitioner has repeatedly challenged and appealed collateral proceedings involving the proceeds from the Sale and possession of the Property. Petitioner's Writ

[16] This puts to rest Petitioner's assertion that the price paid for the Property at the Sale "was egregiously unfair, far below fair market value[.]" Writ, 5.

seeks to continue her challenge nearly seven years after final judgment was entered and the foreclosure sale was consummated. For the many reasons set forth above, Petitioner's Writ should be denied.

Respectfully submitted,

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